APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2030

Dewayne Clifton,
Appellant,

v.

John Ashcroft; William Webster; Dick Moore; George Lombardi; Randie Kaiser; Jeanie Schneider-Thies; Beth Finders; Myrna Trickey; Cranston Mitchell,
Appellees.

David C. Finley,
Appellant,

v.

William Webster, individually and in his official capacity as Attorney General of the State of Missouri; John Ashcroft, individually and in his official capacity as Governor of the State of Missouri; Dick Moore, individually and in his official capacity as Director of the Missouri Department of Corrections and Human Resources; George A. Lombardi; John Does, unknown employees, agents, administrators and facilitators of the State of Missouri who create, administer and enforce programs and policies and complained of hereafter,
Appellees.

No. 92-2501

Everett E. Kennison,
Appellant,

v.

Dick D. Moore; George Lombardi; Dale Riley; Myrna Trickey; Randie Kaiser; Cranston Mitchell; Jeanie Schneider-Thies; Christine Eaves; Tony Gammon; William Buck; Jennifer Sachse; Paul Caspari; Ted Firteg,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: March 15, 1993

Filed: June 29, 1993

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

Dewayne Clifton, David Finley and Everett Kennison, inmates in the Missouri state system, appeal from the district court's grant of a motion to dismiss their complaint challenging the Missouri Sexual Offenders Program (MOSOP). The inmates contend the 1990 MOSOP statute, as applied to them, constitutes an impermissible *ex post facto* law. We reverse the district court and remand for further proceedings.

I.

In 1980, the Missouri legislature promulgated a statute establishing MOSOP, with the stated intent of rehabilitating convicted sexual offenders. The statute specifies: "The ultimate goal shall be the prevention of future sexual assaults by the participants in such programs . . . ." Mo. Rev. Stat. § 589.040.1 (1986). The first phase of MOSOP includes a private interview and nine introductory classes providing an overview of behavior and treatment. *Missouri Sexual Offender Program, For Your*

Information, Appellant's App. 26. The second phase involves roughly twelve months of group therapy.[1] *Id.*

The 1980 statute stated that all convicted sexual offenders must participate in MOSOP:

> All persons imprisoned by the department of corrections and human resources for sexual assault offenses shall be required to participate in the programs developed pursuant to subsection 1 of this section.

Mo. Rev. Stat. § 589.040.2 (1986). In 1984, the Department of Corrections promulgated a regulation requiring completion of the program for parole eligibility:

> Inmates convicted of sex offenses shall participate in and complete the prescribed treatment program developed by the Department of Corrections and Human Resources prior to being eligible for parole (589.040 RSMo).

14 C.S.R. 80-2.020(4)(d), Appellant's App. 30. In 1990, the state legislature amended the MOSOP statute to require inmates to complete MOSOP in order to be considered for parole. Mo. Rev. Stat. § 589.040.2 (Supp. 1992).

Clifton, Finley and Kennison were convicted of rape and/or sodomy before 1990. All three were incarcerated in the Missouri state system. They participated in MOSOP, but failed to complete the program. Because of their failure to complete MOSOP, they were denied credit release dates.

On February 8, 1991, Clifton filed a complaint under 42 U.S.C. § 1983 against various state and prison officials [state

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[1] The program is designed to include a third, voluntary phase with classes in specialized areas. *Missouri Sexual Offender Program, For Your Information*, Appellant's App. 26. The phase was not operative at the time of this action.

officials], alleging the MOSOP completion requirement violated constitutional provisions against *ex post facto* laws and seeking equitable and monetary relief.[2] A week later, Finley filed a similar complaint. The state officials in each case filed motions to dismiss.

On May 6, 1991, the district court consolidated the two cases and granted the motions to dismiss, giving the inmates leave to file an amended complaint including the *ex post facto* allegations. Clifton and Finley filed the amended complaint, and the district court granted a motion to dismiss for failure to state a claim on January 10, 1992.

In April of 1991, Kennison filed a similar complaint and at the district court's request filed an amended complaint on June 5, 1991. On January 13, 1992, the district court granted a motion to dismiss for failure to state a claim.

The inmates in both actions appealed.[3] The district court granted the state officials' motion to consolidate the appeals.

II.

Clifton, Finley and Kennison contend the district court erred in granting the motion to dismiss. They maintain their complaint

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[2] Although monetary relief is permissible in a state prisoner § 1983 case, *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973), equitable relief involving the fact or length of custody is not. *Id.* at 500. To challenge "the very fact or duration of his physical imprisonment" in federal court, an inmate must exhaust state remedies and petition for a writ of habeas corpus under 28 U.S.C. § 2254. *Id.*

[3] Clifton and Finley's notice of appeal had their typed names in the form of a signature block, but neither inmate signed the document. Because the notice of appeal of *pro se* appellants should be construed liberally and the state officials had specific notice of the identity of the inmates, the typed notice is sufficient in this case to confer jurisdiction on appeal. *See Thiem v. Hertz Corp.*, 732 F.2d 1559, 1562 (11th Cir. 1984).

stated a cause of action because the application of the 1990 MOSOP statute to them in denying them parole violated provisions against *ex post facto* laws.

A dismissal is proper if, taking the factual allegations in the complaint as true, no relief could be granted to the complainants. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Further, this court will not review state rehabilitative programs "absent a clear showing that such programs are being purposefully used to infringe upon protected constitutional rights." *Jackson v. McLemore*, 523 F.2d 838, 839 (8th Cir. 1975). An action under 42 U.S.C. § 1983 can provide a remedy only for violations of constitutionally protected rights. *Brookins v. State of Missouri Board of Probation & Parole*, 586 F. Supp. 29, 30 (W.D. Mo. 1984).

Clifton, Finley and Kennison contend the state officials violated their constitutionally protected rights by denying credit release dates on the basis of an *ex post facto* law, in violation of Article I, § 10 of the United States Constitution. An *ex post facto* law has two elements: it is retrospective and it disadvantages the offender. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). For *ex post facto* purposes, we must look at the punishment applicable at the time of the offenses. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The three inmates committed their crimes prior to 1990. The Sexual Offender Program Initial Information required to be read and signed by all participants states:

> The successful completion of MOSOP Phase I and Phase II is mandatory as it relates to release on parole for inmates imprisoned for sexual assault offenses who committed their offenses after August 13, 1980 (589.040 RSMo).

Clerk's Record 84, 104. In denying Finley parole, the Board of Probation and Parole stated "you have not successfully com-

pleted MOSOP as required by law." Appellant's App. 33. As applied to inmates who committed crimes prior to 1990, the revised statute is clearly a retrospective law, thus satisfying the first element of an *ex post facto* analysis.

Clifton, Finley and Kennison argue they were disadvantaged, as required by the second element of *ex post facto* analysis, when they were denied credit release dates because they failed to complete MOSOP, whereas under the law applicable to them, they were merely required to participate in MOSOP.

Under the Missouri parole statute, parole is not a protected constitutional right and inmates have no protected liberty interest in parole. *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985). Nevertheless, to be disadvantaged, an inmate need not suffer the violation of a vested, enforceable right. *Burnside v. White*, 760 F.2d 217, 220 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985). Determination of eligibility for parole relates to an inmate's punishment, *Maggard v. Moore*, 613 F. Supp. 150, 152 (W.D. Mo. 1985), and a statute is *ex post facto* if it adds new punishment to that in effect at the time of the crime. *Peeler v. Heckler*, 781 F.2d 649, 651 (8th Cir. 1986). The inmates' claim that revoking their eligibility for parole constituted a punishment and disadvantaged them retrospectively under the 1990 statute raises a possibility of relief that should be addressed by the district court.

We recognize that apparently two of the inmates committed their crimes after the enactment of the 1984 regulation requiring completion of MOSOP for parole eligibility.[4] The state officials contend that under the terms of the regulation, these two already were required to complete MOSOP and were not disadvantaged by the 1990 statute. The inmates argue the 1984 Department of Corrections regulation requiring completion conflicts with the

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[4] We note unresolved discrepancies in the briefs and the district court opinion regarding the years the various inmates committed the crimes and were sentenced. These facts should be clarified upon remand.

1980 statute and was invalid and wrongfully applied. While we presume the validity of an administrative regulation, a regulation that conflicts with a statute is invalid. *Burnside*, 760 F.2d at 221. Whether a conflict exists, however, between the statute and the regulation is a matter to be addressed on remand.

Because we find that under these facts it would have been possible to grant relief to one or more of the inmates, we reverse the grant of the motion to dismiss and remand for further proceedings consistent with this opinion.[5]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[5] We remand on the *ex post facto* issue. The other issues raised on appeal are without merit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-0254C(6)
Consolidated With:
No. 91-0322C(6)

DEWAYNE CLIFTON,
Plaintiff,

vs.

JOHN ASHCROFT, et al.,
Defendants.

DAVID C. FINLEY,
Plaintiff,

vs.

WILLIAM WEBSTER, et al.,
Defendants.

No. 91-0990C(9)

EVERETT E. KENNISON,
Plaintiff,

vs.

DICK D. MOORE, et al.,
Defendants.

ORDER

[Filed: Sept. 21, 1993]

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motions to dismiss the complaints in these actions for failure to state a claim are granted.

Dated this 21st day of September, 1993

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-0254C(6)
Consolidated With:
No. 91-0322C(6)

DEWAYNE CLIFTON,
Plaintiff,

vs.

JOHN ASHCROFT, et al.,
Defendants.

DAVID C. FINLEY,
Plaintiff,

vs.

WILLIAM WEBSTER, et al.,
Defendants.

No. 91-0990C(9)

EVERETT E. KENNISON,
Plaintiff,

vs.

DICK D. MOORE, et al.,
Defendants.

MEMORANDUM

[Filed: Sept. 21, 1993]

These cases are before the Court on remand from the Eighth Circuit Court of Appeals. In each case, a Missouri inmate convicted of a sexual offense claims that application to him of Mo. Rev. Stat. § 589.040.2, requiring that sexual offenders complete the Missouri Sexual Offenders Program (MOSOP) prior to release on parole, violated the ex post facto clause because he was sentenced prior to the 1990 effective date of an amendment to the statute.

Plaintiffs would be entitled to relief if a statute were applied to them retroactively to their disadvantage. The cases are on remand for a clarification of the dates of plaintiffs' convictions/sentencings, and for a determination of whether a 1984 regulation of the Missouri Department of Corrections is invalid because it conflicts with the original 1980 MOSOP statute. *Clifton v. Ashcroft*, No. 92-2030, slip op. at 7 & n. 4 (8th Cir. June 29, 1993) (unpublished per curiam).

In 1980 the Missouri Legislature enacted Mo. Rev. Stat § 589.042. Subsection 1 of the statute requires the director of the Department of Corrections to develop a program of treatment, education and rehabilitation for all inmates serving sentences for sexual assault offenses. "[T]he ultimate goal shall be the prevention of future sexual assaults by the participants in such programs." Subsection 2 provides that "[a]ll persons imprisoned . . . for sexual assault offenses shall be required to participate in the programs developed pursuant to subsection 1."

In 1984 the Department of Corrections adopted a regulation requiring sexual offenders to complete MOSOP, the treatment program developed by the Department, prior to being eligible for parole. In 1990, the Missouri Legislature amended § 589.040.2 to substitute "successfully complete the programs" for "participate in the programs."

David C. Finley was sentenced on June 30, 1983, for a crime committed in 1982; Everett E. Kennison was sentenced on

February 1988, for a crime committed in 1986; and DeWayne Clifton was sentenced on January 11, 1989, for a crime committed in 1987.[1]

In its cases dealing with the 1980 version of § 589.042, the Eighth Circuit has presumed that the statute required sexual offenders to *complete* MOSOP as a condition for parole eligibility. In *Parton v. Armontrout*, 895 F.2d 1214 (8th Cir.), *cert. denied*, 111 S. Ct. 212 (1990), the Court held that the 1980 statute could not be applied retroactively to require an inmate convicted in 1972 to complete MOSOP. *See also Huston v. Dowd*, No. 91-1642 (8th Cir. Mar. 16, 1992) (unpublished per curiam).

In *Jones v. Moore*, 996 F.2d 943 (8th Cir. 1993), issued one day before the decision remanding the present cases, the Eighth Circuit held that an inmate who had been sentenced in 1982 did not have a liberty interest in being afforded the opportunity to participate in MOSOP, even though he was required to complete the program prior to release on parole. *Id.* at 945.

This interpretation of the 1980 statute is consistent with the purpose as well as the scheme of the statute. It would be meaningless if sexual offenders were only required to attend MOSOP for an unspecified amount of time. A further indication that the original statute required completion of MOSOP for parole eligibility is that even after the 1990 amendment, the descriptive title of the statute remains "Duties of division of corrections — certain inmates to participate in programs."

Thus, it is clear that the 1984 regulation of the Department of Corrections is not inconsistent with the "sense and meaning" of the 1980 statute. *See Burnside v. White*, 760 F.2d 217, 221 (8th Cir.) (administrative regulations are presumed valid; Missouri Parole Board regulation allowing it to consider seriousness of

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[1] As of the date of this opinion all three inmates have been released on parole. Thus, their requests for equitable relief are moot.

crime is not inconsistent with statute providing for parole when prisoner can be released without detriment to himself or society), *cert. denied,* 474 U.S. 1022 (1985).

Furthermore, requiring sexual offenders who, as here, committed their crime after the effective date of the 1980 statute to complete MOSOP for parole eligibility is not a violation of the ex post facto clause as that version of the statute has been interpreted to impose this requirement.

Dated this 21st day of September, 1993.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501

KENNISON
APPELLANT

vs

MOORE
APPELLEE

APPELLANTS MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES

ARGUMENT

In May of 1975 the Supreme Court of the United States of America decided Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) which held prevailing parties in litigation could not recover attorney fees from the losing party absent a showing of extraordinary circumstances. In response to Alyeska Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976 codified as 42 U.S.C. Section 1988. This act was designed to attract competent counsel to undertake civil rights litigation. This legislative history of the act in S. Rep. No 94-1011, 94th Cong. 2d Sess. reprinted in 1976 U.S. Code Cong & ad. News 5908 indicated that fee's would be paid to attorneys in a manner as "traditional with attorneys represented by fee paying clients" even when the results obtained are entirely non-pecuniary or solely of nominal pecuniary value.

Attorney Ablestein was court appointed. There is no exclusion in the act for payment of fees to court appointed attorneys. Case law indicates that payment may be made to attorneys who represent an attorney in fee appeals under 42 U.S.C. Section

1988. See Davis v. Board of School Commissioners, 526 F.2d 865, 868 (5th Cir. 1976), Ramsey v. Chrysler First, Inc., 861 F.2d 1541 (11th Cir. 1988) Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir. 1988). Jackson v. Illinois Prison Review Board, 856 F.2d 890, 896 (7th 1988). Logically then an appellate attorney who is court appointed should be paid if the attorney prevails on appeal. It is incongruous to suggest that a court appointed attorney be denied payment when the court itself sets the scene for the entry of the attorney and limits the attorney action.

Attorney Ablestein was appointed under the inherent power of the court. Ablestein acted as an agent for:

a) the people of the state of Missouri to ensure a government whose actions comply with United States Constitutional principles.

Attorney Ablestein was ethically bound to zealously defend and promote the position of his client due to ethical rules and attorney-client relationship. Attorney Ablestein vigorously researched and litigated the issues in the case. However, it is clear that the prisoner could not pay Attorney Ablestein's fees due to incarceration and indigency. It is for this reason Congress enacted 42 U.S.C. Section 1988 ; so that people aggrieved by unconstitutional acts could seek redress and afford payment of attorney fees.

The scope of Ablestein's agency was limited to that of appellate counsel. While acting within the scope of his agency attorney Ablestein :

a) Achieved the ends of litigation in interest of the federal courts,

b) Achieved benefits to the citizens of the state of Missouri,

c) Achieved success in the appeal by obtaining a reversal and a finding in favor of Appellant,

The scope of Ablesteins agency was limited by the appointment. Prior to appointment Ablestein was not involved in the case nor had any interest in the case. During this agency Attorney Ablestein obtained complete success on the merits of the appeal by obtaining a reversal. This reversal altered the legal status between the Appellant and Appellee by reversing the dismissal and revitalizing the complaint of Appellant which had been previously dismissed.

PREVAILING PARTY STATUS

The legal relationship between Appellant and Appellee has changed. By voluntary action the Department of Corrections agents and individuals have:

1) Released all previously incarcerated inmates and granted them a liberty interest which carries an independent status and requires due process of law to revoke or alter,

2) Gave to Appellants the rights to remand and rehearing at District Court with appointed Counsel.

This leads to the "prevailing party" status question. Appellee indicates in his Motion in Opposition to Attorney Fee's that Farrar v. Hobby, 506 U.S. __, 113 S. Ct. 566, 121 L.Ed. 2d 494 (1992) requires a material alteration in legal status of the parties. The two points made in this paragraph above are both material alterations in the legal relationship of Appellant and Appellee; beyond that these are two of the goals of the lawsuits that the Appellants filed. Appellant contends Appellee reads this case too broadly and does not overturn previous Supreme Court precedent regarding prevailing party status, catalytic results of litigation, voluntary compliance by the defendant that alters relationships between the parties or prevailing party status which occurs when the actions of defendant bring about "mootness". Appellant proposes this case is distinguished in relief sought and

results of plaintiff's litigation — Appellant Kennison sought release from unconstitutional continued incarceration and he received this relief (discussion below).

The prevailing party status occurs when "a party has succeeded on any significant issue in litigation which achieves some of the benefits the parties sought in bringing the action." See Nadeau v. Helgemo, 781 F.2d 275, 278-279 (lst Cir. 1978 and quoted in Hensley v. Eckerhart, 461 U.S. 424 (1983). The parties sought relief from imprisonment and this has occurred. On appeal the parties sought reversal and remand and this has occurred. See Texas State Teachers v. Garland Independent School District, 489 U.S. 792, 109 S. Ct. 1486,1489, 103 L.Ed. 2d 866. The remedy must be legally relevant and in this case it is.

A money judgement is not required to prevail under 42 U.S.C. Section 1983. Injunctions, declaratory relief or voluntary compliance by the defendant supports an award of fees, so long as the remedy obtained "affects behavior of the defendant toward the plaintiff." See Rhodes v. Stewart, 488 US 1, 4 (1988). In this case the agents of the state have given additional liberty status to all incarcerated inmates and have also through Appellee's attorney achieved Federal District Court results in which Judge Gunn has indicated this controversy is "mooted". While Appellant does not agree with this finding and this will be discussed below ; the state has voluntarily in concerted action as a result of this litigation in a manner designed to cut their losses. Appellant may still prevail in a case which is settled or mooted before reaching judgements on the merits if the plaintiff lawsuits or Appellants reversal of district courts findings causes retrenching in so that the lawsuit or reversal is "a substantial factor or significant catalyst in motivating the defendants to end their unconstitutional behavior. See Louisiana High School Athletic Association, 915 F.2d 163 (5th Cir. 1990).

In Appellant Kennison's case he was denied his release date by the Parole Board in November of 1992 and given at that time a release date of October 3, 1993. Kennison was released August 10, 1993. This is clearly action of the Appellee's due to litigation and was involuntary in that:

i) Appellant Kennison was released two months earlier then his release date,

ii) and at a time corresponding with the litigation we are concerned with.

iii) Appellant proposes that the court consider the early release as evincing an intent on the part of Appellees to:

  i) Cut their losses and

  ii) Moot the controversy.

This was one element of the relief requested in Kennisons original complaint. The release on October 3, 1993 was 54 days earlier then his previously established release date. Appellant Kennison did complete MOSOP. In Maher v. Gagne, 448,129 U.S. 122, 100 S.Ct. 2570, 2574, 65 L.Ed. 2d 653 (1980) the Court indicates "For example, a party may be considered to be 'prevailing; if the litigation successfully terminates in a consent decree, an out of court settlement, a voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right.

The United States Senate Report regarding prior 42 U.S.C. Section 1983 awards expressly states that "for purposes of the award of counsel fees , parties may be considered to have prevailed when they vindicate rights through a consent judgement or without formally obtaining relief." S.Rep. No. 94-1011, p. 5 (1976); [1976 U.S. Code Cong. & Ad. News 5908, 5912.]. Since Appellant Kennison had requested release from custody

and is now released he obtained as a result of litigation one of the goals of his litigation;

a) Appellant is no longer incarcerated

b) the state has granted him a liberty interest in parole, and

c) the unconstitutional confinement has ended.

INHERENT POWER OF THE COURT AND BAD FAITH LITIGATION

The Court may shift fees in the case of bad faith litigation. Under inherent power of the Court the federal court can fashion relief where misuse of process occurs or litigation is abused in bad faith. While not making an accusation I will draw the following actions of Appellee to the Courts attention and pray the Court consider the issue of bad faith and fee shifting :

i) According to Mr. Kennison he received correspondence from Appellee's or the Federal Eastern District Court for Missouri that:

a) On September 27, 1993 Appellee's Filed a Motion to Dismiss his Civil Action, and

b) that on that date the Federal District Court by Judge Gunn ruled on the motion and dismissed Appellants case on remand from the Eighth Circuit.

Appellant was not notified that his case had been transferred to a Federal District Court. Appellant was not notified of the motion to dismiss of or of the resultant hearing below. Appellant was not counseled. He was not proceeding pro se because he had no notice of the proceeding. Either Appellee's or Judge Gunn if done on his own motion has deprive Appellant of Due

Process of Law as found in the Fifth and Fourteenth Amendment United States Constitution and the right to compulsory process of witnesses and right to confrontation under the Sixth Amendment United States Constitution and the Right to Counsel as secured in the sixth amendment (either pro se, appointed or retained- this being particularly in question due to the nature of the action before the court arising from alleged criminal acts, a criminal conviction and status of Appellant in relationship to the State of Missouri by virtue of criminal conviction and liberty interest retained upon release from confinement.

ii) During the course of Appeal, Appellees :

a) Had ex-parte contact with the court to dismiss or affect appeal after oral argument without notification to Attorney Ablestein,

b) Either through misunderstanding or deliberation:

1) Misstated in reply briefs statements attributed to Attorney Ablestein and reworded arguments or put forth arguments which Appellant's Attorney did not make while attributing the arguments to Attorney Ablestein; which served to mislead the Court and turn argument away from issues Appellant presented.

c) In response to requests by the Court for dates of incarceration were vague and ambiguous while having complete access to Attorney General for State of Missouri and Department of Corrections records.

If the Court finds any of these actions to be bad faith litigation in it's inherent power Appellant requests Attorney fees be awarded to Appellant. That the Court has this power may be found at F. D. Rich Co., 417 U.S. 116, 129, 94 Su. Ct. 1157, 2165 or Vaughn v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed. 88. (162)

CONSTITUTIONAL INTERPLAY WITH INHERENT POWER OF THE COURT AND COURT APPOINTED ATTORNEY FEES

Attorney Ablestein was appointed under the inherent power of the Court. Attributed to Abraham Lincoln while practicing as an attorney is the statement a lawyers time is his stock and trade. The efforts Attorney Ablestein put forth in this appeal were a taking under the Fifth Amendment of Attorney Ablestein's property — his stock and trade; that being time and as a result the State should compensate Attorney Ablestein for this taking.

If under the inherent power of the Court, the Court may shift fees to accomplish the ends of justice, then it can award Appellant Attorney fees to pay court appointed Attorney Ablestein. If the taking of Attorney Ablestein's stock and trade was known to the court then Attorney Ablestein proposes this was a taking without due process of law and a violation of Attorney Ablesteins civil rights as guaranteed under the Fifth and Fourteenth Amendment United States Constitution.

Attorney Ablestein was not admitted to the Eighth Circuit when the Court appointed this case under it's inherent power. In fact after appointment to the case, Attorney Ablestein's application for admission to practice before the Eighth Circuit was returned, denied for failure to have a sponsor's signature. If attorney Ablestein has rendered service to the state and federal government under penalty of sanctions and is denied compensation for his stock and trade then Appellant suggests that this is a violation of the equal protection clause of the Fourteenth Amend-

ment United States Constitution in that the Court has established a sub-class of citizen who are denied the same and equal protection from denial of property rights then other citizens, this sub-class being the class of state Attorneys versus non-attorney citizens.

PRAYER FOR ADDITIONAL RELIEF

In it's inherent power and as a matter of law under 42 U.S.C. Section 1988 this Court may find for Appellant. Should this Court find for Appellant, Appellant prays the court award an upward adjustment of the fee for delay in compensation as per Missouri v. Jenkins, 491 U.S. 274, 284 (1989) and Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711 (1987) and an adjustment or direct payment for additional time in litigation of the fee issue as per Jones v. MacMillan Bloedel Container, Inc. 685 F.2d 236, 239 (8th cir ____). Regarding other aspects of the Attorney fee's deemed awardable, Appellant defers to the Courts interpretation of "reasonableness" both in time, lodestar rate and adjustments relying on the Courts sense of justice at this time and without cause to argue same.

/s/ David Ablestein,
Attorney-Appellant
9378 Olive Street Road
Suite 120
St. Louis, Missouri 63132
(314) 994-7112

A copy of the above was sent first class postage pre-paid to Mr. R. Henry Branom, acting for Sandberg, Phoenix and von Gontard P.C., One City Centre, 15th Floor, St. Louis, Missouri 63101 on the 9th October, 1993.

/s/ David Ablestein
David Ablestein,
Attorney-Appellant

APPENDIX E

SANDBERG, PHOENIX & VON GONTARD
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
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October 26, 1993

Mr. Michael Gans
Clerk of the U. S. Eighth
Circuit Court of Appeals
1114 Market Street
St. Louis, MO 63101

Re: Everett E. Kennison v. John Ashcroft, et al.
No. 92-2501

Dear Mr. Gans:

Let this serve as Appellees' Response to your request of October 20, 1993, concerning Appellant Kennison's release from prison.

The facts as stated on page four of Appellant's Reply Memorandum in Support of Motion for Attorney's Fees and quoted in your letter of October 20, 1993, are not true.

On December 30, 1991, the Parole Board extended inmate Kennison's release date to October 2, 1993. This Summer, in response to the flooding which hit the State of Missouri, Governor Mel Carnahan issued Executive Order 93-18. This Order was in response to the flooding of the Renz Correctional Center. The

flooding of the Correctional Center caused the relocation of the inmates from that facility to other correctional centers in the State. Pursuant to Executive Order 93-18, inmates who were close to their release date were released from prison in order to ease the crowded conditions. A condition of release for those inmates was that they participate in flood relief efforts as directed by their individual parole officers. Inmate Kennison was released to the Electronic Monitoring Program on August 10, 1993, pursuant to this Order. He was eligible for release, pursuant to Executive Order 93-18, because he had successfully completed MOSOP. Parole was granted to Mr. Kennison on the scheduled date of 10-2-93.

The decision to release inmate Kennison was not influenced in any manner whatsoever by this litigation. The persons involved in the decision to release inmate Kennison were unaware of the pendency of this case. Inmate Kennison's parole file is completely void of any reference to this lawsuit. Inmate Kennison was treated no differently than the hundreds of other inmates who were released under this special occurrence necessitated by the flood disaster in the State of Missouri.

I hope this answers the Court's questions concerning this matter, however, if it does not, please feel free to contact me.

Very truly yours,

/s/ R. Henry Branom Jr.
R. Henry Branom Jr.

RHB: jar
cc: Mr. David Abelstein

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501

EVERETT E. KENNISON,
Appellant,

vs.

JOHN ASHCROFT, et al.,
Appellees.

APPELLEES' REPLY TO APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES

COME NOW Appellees, by and through their Attorneys, Sandberg, Phoenix & von Gontard, P.C., and hereby submit their Reply to Appellant's Memorandum in Support of Motion for Attorney's Fees.

I. FACTS

Appellant Kennison, while incarcerated at the Missouri Eastern Correctional Center, filed a *pro se* 42 U.S.C. § 1983 action against Appellees. In his Complaint, Appellant alleged that the requirement that he complete the Missouri Sexual Offender Program ("MOSOP") prior to being eligible for parole violated the *ex post facto* provisions of the Constitution. *See* § 589.040 RSMo. Appellees filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court granted this Motion, and the instant appeal was taken.

This Court appointed Attorney David Abelstein to represent Kennison on appeal. The case was briefed and argued before the Court on March 15, 1993. After the argument, Rick White, a Clerk for the Court, contacted the undersigned Attorney for

Appellees, and asked for information regarding the conviction date of the Appellant. In response, Counsel sent a letter to Mr. White containing the relevant dates and also sent a copy to Counsel for Appellant. On June 29, 1993, the Court issued its opinion, which remanded the case on the ex *post facto* issue. The Court held that, "The other issues raised on appeal are without merit." *See* Opinion, p.7, n.5. Appellee subsequently filed a Petition for Rehearing, or in the Alternative, Rehearing En Banc. This summer, Missouri Governor Mel Carnahan issued Executive Order 93-18. That Order provided that certain inmates could be released from incarceration in order to relieve overcrowding in the Department of Corrections caused by the flooding of the Renz Correctional Center. A condition of the inmate's release was that they were to participate in flood relief activities as directed by their parole officer. Appellant was released pursuant to this Executive Order. He was considered for release under this program because he had successfully completed MOSOP during the pendency of this litigation.

On August 17, 1993, the Court denied Appellees' Petition for Rehearing. On August 24, 1993, the mandate of the Court was issued, remanding the case to the United States District Court for the Eastern District of Missouri. Listed on the cover letter from the Clerk of the Court are Appellee Kennison, as well as Attorney Abelstein.

Appellant has filed a Motion seeking attorney's fees, pursuant to 42 U.S.C. § 1988, as a "prevailing party", in the amount of $19,035. Appellees filed a Memorandum in Opposition to this Motion. At the Court's request, Appellant then filed a Memorandum in Support of Motion for Attorney's Fees.

II. ARGUMENT

A. PREVAILING PARTY

Appellant is not entitled to attorney's fees because he is not a prevailing party. To be considered a prevailing party within the

meaning of § 1988, Appellant must be able to point to a resolution of the dispute which changes the legal relationship between himself and the Appellees. *Texas Teachers v. Garland School Dist.*, 49 U.S. 782, 792 (1989). Appellant argues here that because he was released from incarceration, he has effected a change in the status between himself and Appellees. Appellant, however, also states in his Memorandum that he successfully completed MOSOP. The completion of MOSOP, and the flood relief program, however, are what led to Appellant's release from incarceration.

This Court did not order Appellees to release Appellant from incarceration. In fact, even if Appellant sought that as relief, this Court held that issue was without merit. (*See* Opinion, p.7, n.5.). The only result of Appellant's appellate efforts was to achieve the right to continue proceeding in the District Court. An interlocutory ruling, however, that a Complaint should not have been dismissed for failure to state a claim, is not a legal victory sufficient to award attorney's fees. *Hewitt v. Helms*, 482 U.S. 755, 782 (1987).

Moreover, the District Court has, after this Court remanded the case to the District Court, held that Plaintiff/Appellant's Complaint still did not state a claim. Thus, it is even more clear that Appellant is not the prevailing party in this case.

B. BAD FAITH LITIGATION

Appellant suggests, without support and improperly so, that Appellees in this case have somehow been involved in bad faith litigation. Appellant claims to have somehow been kept in the dark concerning the proceedings in this case. A review of this Court's file indicates that both Appellant and his Counsel were listed as having been mailed copies of all rulings subsequent to the issuance of the opinion in this case. Furthermore, the Court's opinion specifically remanded the case for further proceedings

in the District Court. It is inconceivable that Appellant's Counsel could somehow be surprised that the case was, in fact, remanded.

Appellees filed no motion in the District Court after the remand. The District Court, Honorable George F. Gunn, Jr., *sua sponte* granted dismissal. No hearing was conducted. Despite Appellant's assertions, Appellees, nor their Counsel, have had no *ex parte* contact with the District Court. To make such claims without support is, itself, improper.

Counsel for Appellees did reply to an inquiry of a Clerk of this Court concerning the date Appellant committed his crime and the date he was sentenced to prison. Moreover, a copy of this correspondence was sent to Counsel for Appellant. Clearly, it is not an *ex parte* contact.

Appellant further alleges in paragraph (b) on page 6 of his Memorandum that Appellees misstated, in a Reply Brief, statements attributed to Attorney Abelstein. Curiously, and as this Court can see for itself, Appellees did not file a Reply Brief. Quite frankly, the undersigned Counsel for Appellees is unable to ascertain what Appellant is alleging in paragraph (b).

Rule 11 of the Federal Rules of Civil Procedure provides that the signature of an attorney on a pleading signifies that after having read the pleading, and to the best of the signer's knowledge, information and belief, that the allegations made therein are well founded in fact and are formed after reasonable inquiry. Fed.R.Civ.P. 11. Clearly, Counsel for Appellant has not complied with this requirement. A simple review of the District Court and Court of Appeals' file would reveal that the allegations of bad faith litigation made in Appellant's Memorandum are not true.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellees pray this Honorable Court deny Appellant's Motion for Attorney's Fees.

Respectfully submitted,

SANDBERG, PHOENIX
& von GONTARD, P.C.

By /s/ R. Henry Branom Jr.
R. Henry Branom Jr.
One City Centre 15th Floor
St. Louis, Missouri 63101
(314) 231-3332

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, first-class postage prepaid, this 28th day of October 1993, to:

Mr. David Abelstein
Attorney at Law
9378 Olive Street Road
Suite 120
St. Louis, Missouri 63132

/s/ Joyce Ratcliffe

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2501EMSL

Everett E. Kennison,
Plaintiff - Appellant,

vs.

Dick D. Moore, et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

On review of the motion for attorney's fees by appellant's attorney, we grant an allowance of $2,500 on the ground that appellant in this case has prevailed, if at all, only to a slight degree.

Judge Wollman dissents from the order and would not allow any attorney's fees.

December 14, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2030/2501EMSL

Everett E. Kennison,
Appellant,

vs.

Dick D. Moore, et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 9, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit